IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 841 of 1999

in

FIRST APPEALNo 5768 of 1998

For Approval and Signature:

Hon'ble MR JUSTICE MR. C.K.THAKKAR and
MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LATE CHATURBHUJ MULJI,THRO'HISHEIRS
Versus
HEIRS AND LEGAL REP.OF DECD. PREMJI HARIRAM

Appearance:
MR SURESH M. SHAH WITH MR C.H.VORA, for Appellants
MR S.B.VAKIL FOR THE RESPONDENTS

CORAM : MR JUSTICE MR. C.K.THAKKAR and
MR.JUSTICE K.M.MEHTA
Date of decision: 02/2000

CAV JUDGEMENT

Per Thakker, J:

This appeal is filed against dismissal of First appeal No. 5768 of 1998 by the learned Single Judge on May 12, 1999.

The facts giving rise to the present appeal as stated by the learned Single Judge in the judgment impugned in this LPA are that on May 12, 1953, a registered deed was executed by defendant Nos. 1 to 4 , ("mortgagors" for short) in favour of one Ranchhoddas Meghji ("mortgagee" for short) for a sum of Rs. 75,000/-. Firm of Ranchhoddas Meghji, appellants herein (original defendant) owed certain amount for which it assigned the right, title and interest in the said property by a registered deed dated April 23, 1956 in favour of the plaintiffs. Documents of title of the property were handed over to the plaintiffs . In 1959, plaintiffs filed Civil Suit No. 7 of 1959 in the Court of the Civil Judge (S.D.),Bhuj against defendant Nos. 1 to 4 for recovering an amount of Rs. 89,650/- . Defendant No.5 died during the pendency of the proceedings and his heirs and legal representatives were brought on record as defendant Nos. 5(a) to 5 (f) . On April 29, 1960, a consent decree came to be passed in the said suit.

The relevant portion of the consent decree as quoted by the learned Single Judge reads as under :

"Hence, decree against the defendants nos. 1,2,3 and 4 in favour of the plaintiff as under:

1. That the defendants nos.1,2,3 and 4 should pay to the plaintiffs an amount of Rs. 60,000/- (Rupees sixty thousand only) by 15.10.1960 and if they do not pay the same,then the plaintiff is entitled to execute the decree by taking into possession for enjoyment the properties described in plaint vide four direction as usufructuary mortgagee for due amount.

2. If the defendants noa.1,2,3 and 4 herein pay to the plaintiffs an amount of Rs. 55,000/- by 15.10.1960 then, the plaintiffs will be bound to let go the remaining amount due.

3. Out of the premises mentioned in the plaint under four direction one premise inside the Deli/ premises facing on eastern side has been handed over in possession of the plaintiffs by the defendants and if the defendants pay an

amount of Rs. 55,000/- to the plaintiffs by15.10.60 then, they will be entitled to take back the possession and if they do not pay the said amount by15.10.60, then along with other premises they will be entitled to enjoy for Rs. 60,000/- as usufructuary mortgagee.

4. That there is an amount of Rs.1,11,700 (Rupees one lakh eleven thousand and seven hundred only) due to be recovered by the plaintiffs herein from the defendants Nos.1,2,3 and 4 accept the same. That in view of the old relationship of the plaintiffs with the defendants nos. 1,2,3 and 4 , the plaintiffs have with a view to give relief and agreed to enjoy the suit property as mortgagee in possession (Vatantar) for Rs. 60,000/- .But in the event of auction in the "second mortgage" or the defendants nos.5 and 5 D/E/F in the event of auction of another debt of defendants nos.1,2,3 and 4 at that time, the plaintiffs will be entitled to recover the said full amount of RTS.1,11,700/- (in words rupees one lac eleven thousand seven hundred) mentioned in the decree and the person purchasing the suit properties during the auction or the said second mortgagees will only be entitled to take over possession of the suit properties only after paying the said amount.

5. That the defendants herein give up all their disputes with the plaintiffs and after hearing arguments of both the sides, following judgment is being delivered.

In respect of defendant No.5 herein, following decree is made against the defendants Nos.1,2,3 and 4 herein who should pay an amount of Rs. 20,000/-(Rupees twenty thousand only) along with the costs of the present suit to the defendant no.5 who is second mortgagee within period of six months and if that is not happened then the defendant No.5 will be entitled to file an application for passing of the final decree. As regards costs to the other parties,no order is being made.In respect of the mortgage of the plaintiffs, the composite decree is passed as above and if no recovery is made, then, the defendant No.5 and its mortgagees in case it is felt legal, may file application for personal decree and such order is passed."

It was not disputed before the Court that defendant Nos. 1 to 4 failed to deposit in the Court amount of Rs. 50,000/- as mentioned in clause 2 of the consent decree or Rs. 60,000/- as mentioned in clause 1 of the consent decree. Clause 3 , therefore, operated which provided that the plaintiffs would retain possession as usufructuary mortgagee. It is also not in dispute that the subsequent mortgagee-defendant No.5 did not take any step to recover amount from defendant Nos.1 to 4, as stated in Clause 5 of the consent decree. On January 7, 1988, defendant No.3 filed an application, Ex. 75 which was registered as Civil Misc. Application No. 10 of 1988. It was inter alia stated in the said application that on April 29., 1960, consent decree was passed in the suit under which defendants Nos. 1 to 4 were required to pay Rs. 60,000/- to the plaintiffs and Rs. 20,000/- to defendant No.5. It was further stated that as per the said terms, defendant No.3 had deposited Rs. 62,478.25 (Rs. 60,000/- + Rs/ 2,438.25 towards costs) of the plaintiffs and Rs. 20,560/(Rs. 20,000/- + Rs. 650/towards costs) of defendant No.5 and thus, he was entitled to redeem the property. In spite of the consent decree and deposit of amount by defendant No.3, possession of the property was not handed over to him. Defendant No.3, therefore, prayed to pass final decree and to hand over possession of the mortgaged property to him.

The plaintiffs resisted the said application by raising several objections. Mainly, it was contended that the application made by defendant No.3 was not maintainable at law as no preliminary decree was passed in his favour for redemption of mortgage; the application was time barred and there was non-compliance with terms and conditions of the consent decree and hence, he was not entitled to the reliefs prayed for in the application.

The trial court negatived all the contentions and passed a decree directing the plaintiffs to deliver the documents of the property and also possession thereof to defendant No.3 . The trial court held that the application was not time barred and that defendant No.3 was entitled to possession of the mortgaged property . Accordingly, the final decree was passed by the Court.

Being aggrieved by the said decree passed by the Trial Court, the above FA was filed by the appellants. At the

time of hearing of the appeal, three contentions were raised by the learned counsel for the appellant. It was submitted that the application filed by defendant No.3 was not maintainable at law and the Trial Court had committed an error of law in entertaining the said application. It was also argued that such application could not have been filed after more than two decades of the consent decree passed by the Trial Court and the application was barred by law of limitation. It was further urged that since terms and conditions of the consent decree were not complied with, the appellants were entitled to Rs. 1,11,700/- to be recovered by them from defendants Nos. 1 to 4 on the date of decree.

The learned Single Judge , in view of the fact that the matter was very old and the parties were before the Court, finally disposed of the appeal after hearing them. So far as the third contention was concerned, the learned Single Judge was of the view that the contention raised on behalf of the mortgagees was well founded and deserved to be upheld. Accordingly, that part of the decree passed by the Trial Court was modified and a direction was issued to the defendants to pay Rs. 1,11,700/along with interest and other amount as observed in para 20 of the judgment which reads as under :

"20. In view of the above discussion,subject to the following modifications regarding amounts to be deposited by defendants Nos. 1, to 4 for payment to the plaintiffs and the exercise to be undertaken by the trial court under the provision of Rule 10 of Order 34, CPC, the order dated 16.9.1998 of the Civil Court below application, exh. 20 holding that the said application is maintainable and that the same is not time barred is hereby confirmed.

The aforesaid order dated 16.9.1998 passed by the trial court shall operate provided the mortgagors respondent Nos.1 to 4 herein deposit the balance amount of difference between Rs. 1,11,700/.and Rs. 60,000/- (which is already deposited (i.e. Rs. 51,700/- along with interest at the rate of 6% per annum from the date of preliminary decree dated 29.4.19060 till the date of deposit of such balance amount before the trial court. No interest is to be paid by defendants Nos.1 to 4 on the amount of Rs.60,000/- already deposited before the trial court between 7.1.1998 (the date of the application) and the date of payment to

the plaintiffs but if the amount was invested by the trial court in a fixed deposit, the interest accruing on the same shall be paid to the plaintiffs."

A statement was made by the learned counsel for the respondent-mortgagor-defendant No.3 that as per the order passed by the learned Single Judge, the amount was already deposited.

The question ,therefore,arises as to whether the Trial Court as well as the learned Single Judge had committed an error of law in deciding the remaining two contentions raised on behalf of the appellants.

Now, so far as maintainability of application filed by defendant No.3 is concerned, the learned Single Judge has observed that the application was competent as defendant No.3 was mortgagor and the consent decree was passed by a competent Court in which rights and liabilities of the parties were crystalised. The learned Single Judge also observed that in view of the fact that amount could not be paid which was required to be paid within a particular period, the plaintiffs-mortgagees became usufructuary mortgagee and in that capacity, they continued to remain in possession. In these circumstances, it was open to defendant No.3 to make an application disclosing his readiness and willingness to comply with the terms and conditions of the consent decree and to pray to pass an appropriate order by the Trial Court.

On behalf of the appellants, it was contended that the Trial Court was not right in holding the application maintainable inasmuch as the decree which was passed on April 29, 1960 could not be said to be preliminary decree.If it was so, an application for passing final decree was not maintainable. The learned Single Judge negatived the contention by holding that the application was maintainable. Mr.Shah, however, drew our attention to the observations made by the learned Single Judge in the judgment impugned in the present LPA , that the learned Single Judge was satisfied that the decree in question could neither be said to be a preliminary decree nor a final decree.

The said sentence reads as under :

"On a close analysis of the consent decree dated 19 (29).4.1960, it appears that even though consent decree did not purport to be a preliminary decree, it did not purport to be

final decree either".

Mr. Shah submitted that if the decree was not a preliminary decree, any other remedy might have been available to defendant No.3, but remedy by way of filing an application for final decree could not be available and such application would not lie.

The learned Single Judge , however, stated in para 14 as under :

"Hence, in the event of the sale of the suit properties at the instance of defendant No.5, the auction purchaser or the second mortgagee will be entitled to take over the possession of the suit properties only after paying the full amount of Rs. 1,11,700/- to the plaintiffs. It is thus clear that the court passing the decree was conscious of the fact that it was not passing any final decree and that some further steps were going to be taken so as to completely discharge the rights and obligations of the parties under the mortgage transaction."

The learned Single Judge thus was of the opinion that after passing of decree on April 29, 1960, further actions were required to be taken by the parties. If that fact is to be taken into account in its proper perspective, the application made by defendant No.3 wherein he had shown his readiness and willingness to perform his part of obligations under the decree, the application cannot be held to be incompetent and accordingly, the said contention was negatived.

Regarding limitation, the learned Single Judge held that it was always open to defendant No.3 to take appropriate steps for getting his rights crystalised by filing an appropriate application and no limitation would come in his way and even that contention had no force.

It is the above order which is challenged by the appellants before us.

Both the contentions which were raised on behalf of the appellants have been reiterated before us. Our attention was also invited to some of the decisions of the Honourable Supreme Court as well as of this Court. Particular reference , however, requires to be made to a decision of Division Bench of this court in Dhami Navnitbhai Amratlal and others vs. M/s Bhagvanlal

Chhaganlal and another, (1978) 19, GLR 420. It was the contention of defendant No.3 that almost in similar circumstances, the Division Bench granted relief in favour of mortgagor and that the learned Single Judge , relying upon the said decision, has rightly dismissed the appeal.

In Dhami Navnitbhat Amratbhai, the mortgagor was granted time to pay morgtage amount and to redeem property. There was failure on his part to pay the same. The question before the Court was whether the mortgagor had thereafter right to redeem the mortgage or not. Holding that the mortgagor had such right, the Division Bench observed as under :

> "To the extent that mortgagors were given time to pay Rs. 18,000/- within six months,this decree is indisputably a preliminary decree, because if the mortgagors failed to pay the amount within the time fixed by teh court by consent of parties or within such extended time; as the court may grant, the plaintiff mortgagee will have to take further steps, namely to seek the final decree for bringing the property to court sale. To this extent, the decree is a preliminary decree.But the decree further recites that in the event of the failure of the mortgagors to pay the amount in time prescribed by consent of the parties, the property could be brought to court auction and sold and balance if any,can be recovered from the person and other property of the mortgagors, the decree indisputably is a final decree. And it is well recognized that a decree can be partly preliminary decree and partly final."

In our view, the trial court considered the compromise decree passed between the parties in its correct perspective and rightly held that the application in pursuance of terms of decree was maintainable. It further observed that at the time of consent decree, relationship between the plaintiff and the defendant continued to be that of mortgager and mortgagee. Relying on various decisions, the trial court correctly observed that under the Code of Civil Procedure a decree may be preliminary or final or partly preliminary and partly final. It has further held that passing of final decree without passing a preliminary decree is not ipso-facto invalid or illegal and does not render such decree

incapable of execution.

In Dhami Navnitbhai Amratlal almost a similar question arose before the Division Bench of this court and it was held that in case of mortgage decree, an execution can be granted and possession can be ordered to be handed over to the mortgagor. According to the Division Bench, even if there is no provision in the decree for return of possession, obligation to return possession would not come to an end. In that case, the expression used in compromise decree was to the effect that the mortgagor was entitled to recover possession of the ground floor portion of the mortgaged property according to law. It was, therefore, contended that the decree was merely declaratory one and the only remedy available to the mortgagor was to file a suit for possession on the basis of such declaration and to obtain a decree and to file execution petition thereafter. The Division Bench referring to a decision of the Supreme Court in Prakash Chand vs. Harnam Singh, AIR 1973 SC 2065 held that a decree could not be said to be declaratory.

In Prakash Chand, clause 7 of the award provided that on the happening of certain event the respondent "shall be entitled to take back possession" . It was held to be not only declaratory but executable decree.

On the basis of Division Bench decision, the trial court held that the decree was executable and we do not find any infirmity in it.

But even if it is assumed that some application was necessary, an application was filed on behalf of the person entitled to get possession was maintainable and such decree can be executed. Learned Single Judge, in our view, rightly agreed with the finding recorded by the trial court and held that the trial court in arriving at said conclusion did not commit any error of law. We see no error of law in the order and/or reasoning of the trial court or the learned Single Judge. The first contention, therefore, must be negatived.

So far as the second contention regarding limitation is concerned, the learned Single Judge has rightly held that the application filed by defendant No.3 was not barred by limitation.

In support of the order passed by the trial Court and confirmed by the learned Single Judge, Mr. Vakil drew our attention to a decision of the Supreme Court in K. Parmeshwarn Pillai vs. K. Sumathi alias Jesis Jessie

Jacquiline, 1993 (4) SCC 431. In para 6, the Apex Court stated:

"In the case of usufructuary mortgage clause (a) sub rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists, though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the limitation Act. The reasons are obvious. Order 34 rule 8 (3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule 8 (3) of Order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand, the liability continues to subsist against the mortgagor,therefore, it is up to the mortgagor to redeem the mortgage, Till then, his liability under the mortgage continues to run on the estate. It is,therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree of redemption other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof."

We are, therefore, of the view that the second contention

has also no force and it is hereby rejected.

For the foregoing reasons, we see no substance in any of the contentions of the learned counsel for the appellant. The Letters Patent Appeal deserves to be dismissed and is accordingly dismissed. In the facts and circumstances, no order as to costs. Ad-interim relief granted earlier by the learned Single Judge stands vacated.

Learned counsel for the appellants prays that ad-interim relief granted by the learned Single Judge and continued thereafter may be continued for some time so as to enable the appellants to approach the Supreme Court. In the facts and circumstances of the case, ad-interim relief granted is extended upto March 31, 2000.

(C.K.Thakker, J.)

(K. M. Mehta, J.)

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